WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

VIA ECFS ***EX PARTE***

May 7, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Suite TW-A325
Washington, DC 20554

Re: ***Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island,*** **WC Dkt. No. 08-24;** ***Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area,*** **WC Dkt. No. 08-49**

Dear Ms. Dortch:

One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc. (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit this letter in the above-referenced proceedings in response to several claims made by Verizon in its May 1st Ex Parte Letter.[1]

First, Verizon attempts to dispute that resale-based competition should be excluded from the Commission's forbearance analysis.[2] But Verizon fails to respond to the Joint Commenters' fundamental argument that resale-based competition cannot logically be included in a calculation of competitors' market share because *it is competition that relies on incumbent LEC facilities*.[3] Moreover, while Verizon seems to dispute the fact that resellers can only offer the services already made available to them by the incumbent LEC,[4] the FCC itself has held that "carriers reselling

[1] *See* Letter from Rashann Duvall, Regulatory Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed May 1, 2009) ("Verizon May 1st Ex Parte Letter" or "May 1st Ex Parte Letter").

[2] *See id.* at 23-24.

[3] *See, e.g.*, Letter from Thomas Jones, Counsel for One Communications et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49, Attachment entitled "Factual and Legal Support for Competitors' Proposed UNE Forbearance Standard," at 8 (filed Apr. 14, 2009) ("Joint Commenters' April 14th Ex Parte Filing").

[4] Verizon May 1st Ex Parte Letter at 23.

incumbent LEC services are limited to offering the same service an incumbent offers at retail."[5] Furthermore, in response to the Joint Commenters' argument that resale-based competition is qualitatively different from UNE-based competition, Verizon claims that the Joint Commenters do not provide "a single example" of an innovative service offered by a UNE-based competitor.[6] Verizon apparently failed to read paragraph 12 of the Declaration of Russell Oliver, Executive Vice President of Strategy for One Communications.[7] In his Declaration, Mr. Oliver explains that "One Communications is developing a service that relies on multiple conditioned copper UNE loops that are bonded together using Ethernet in the First Mile over Copper technology to deliver" high-speed Internet access that "is more reliable" than traditional ADSL service, that "provides near symmetrical bandwidth speeds," and that "enables small and medium-sized businesses to receive lower-priced, high-speed Ethernet services where fiber does not exist."[8] It would be impossible for One Communications to provide such a service using resold voice service rather than UNEs.

Verizon next asserts that the Joint Commenters also fail to "address the fact that Wholesale Advantage and special access give CLECs these same supposed capabilities," apparently meaning that Verizon believes that Wholesale Advantage and special access are substitutes for UNEs.[9] As the Joint Commenters have explained repeatedly in the record, however, the existence of competition based on Wholesale Advantage and special access is entirely irrelevant to a UNE forbearance analysis because, like resale-based competition, it is competition that relies on incumbent LEC facilities and because the prices for loops sold as part of Wholesale Advantage and as special access are disciplined by the availability of UNEs.[10]

Second, Verizon alleges that while Cox offers wholesale services in Rhode Island and Virginia Beach, "it is One [Communications] who chooses not to deal with Cox" as an alternative wholesale supplier of loops because "One [Communications] prefers to rely on a single wholesale provider."[11]

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[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶ 332 (1996). Verizon also fails to respond to the Joint Commenters' argument that the pricing of resold services fails to constrain incumbent LEC prices and therefore, should be excluded from any analysis of whether competition in the relevant product market is sufficient to warrant forbearance. *See* Joint Commenters' April 14th Ex Parte Filing at 8 & nn.35-36.

[6] Verizon May 1st Ex Parte Letter at 23.

[7] *See* Declaration of Russell Oliver on Behalf of One Communications Corp., ¶ 12 (Attachment A to Joint Commenters' April 14th Ex Parte Filing) ("Oliver Declaration" or "Declaration").

[8] *Id.*

[9] Verizon May 1st Ex Parte Letter at 23.

[10] *See, e.g.*, Letter from T. Jones, Counsel for One Communications Corp. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 08-24, at 11-12 (filed Dec. 3, 2008).

[11] Verizon May 1st Ex Parte Letter at 24.

Verizon's claim is entirely disingenuous. One Communications does not "*prefer*" to rely on a single wholesale provider. Rather, One Communications *must* rely on one supplier because *it is not cost-efficient* to do otherwise. As Mr. Oliver stated in his Declaration, "the fixed and recurring transaction costs associated with establishing and managing two or more wholesale relationships are generally too high to enable One Communications to rely on two wholesale providers."[12] In fact, One Communications is eager to find an alternative wholesale provider to Verizon in Rhode Island. It is precisely for this reason that One Communications has engaged Cox in discussions regarding Cox's wholesale offerings in Rhode Island. Indeed, according to Mr. Oliver, "One Communications has repeatedly requested pricing and other information from Cox, *but Cox has been reluctant to provide it*."[13] Contrary to Verizon's misrepresentations, Cox is not a viable alternative wholesale supplier merely because its pricing (of which a more detailed discussion is not permitted pursuant to the terms of a nondisclosure agreement signed by the parties) is too high. As Mr. Oliver has explained, Cox "does not cover all of the areas that One Communications seeks to provide service in Rhode Island" and "One Communications has no basis for concluding that Cox has developed sufficient wholesale [Operations Support Systems] to enable One Communications to rely on it as a viable alternative provider of wholesale loops."[14] It is therefore Verizon's deliberate refusal to read the text of Mr. Oliver's testimony, not the testimony itself, that is self-serving.

Third, according to Verizon, under Section 10(a) of the Act, "Verizon has the flexibility to determine the geographic areas for which it may seek relief."[15] This claim is specious. Section 10(a) provides that "*the Commission* shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier[(s)] . . . in any or some of its or their geographic markets, if the Commission determines that" the three criteria of subsections (a)(1)-(3) are satisfied.[16] Therefore, under the plain language of the Act, it is the Commission—not Verizon—that has the final say in defining the relevant geographic area for purposes of assessing forbearance petitions. In addition, while Section 10(c) explicitly states that a petitioner may choose the services for which it seeks forbearance, neither subsection (c) nor any other part of Section 10 states that a petitioner chooses the *geographic markets* for which it seeks forbearance.[17] It is appropriate to infer that Congress intended

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[12] Oliver Declaration ¶ 10.

[13] *Id.* ¶ 11 (emphasis added). In particular, "Cox has failed to provide entire categories of price and feature information that One Communications has requested." *Id.*

[14] *Id.*

[15] Verizon May 1st Ex Parte Letter at 24.

[16] 47 U.S.C. § 160(a) (emphasis added).

[17] *See id.* § 160(c).

that the *FCC* should define the term "geographic markets" in Section 10(a).[18] Furthermore, the Commission's interpretation of this ambiguous term is entitled to *Chevron* deference.[19]

It is entirely reasonable for the FCC to define "geographic markets" under Section 10(a) as Metropolitan Statistical Areas ("MSAs"). Such a definition would not be inconsistent with the other provisions of the statute or its underlying goals. Moreover, consistently assessing forbearance petitions on an MSA basis would be administratively efficient because it would diminish the number of disputes concerning the relevant geographic market and enable the Commission to focus on the merits of each petition. It would also increase regulatory certainty by enabling incumbent LECs to more readily determine where they can seek forbearance in the future and by enabling competitors to more readily predict where they can rely on UNEs.

For the foregoing reasons, and for the reasons set forth in their previous filings in the above-referenced dockets, the Joint Commenters urge the Commission to adopt their proposed standard for assessing UNE forbearance petitions and to deny both of Verizon's pending forbearance petitions.

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones
Nirali Patel

Attorneys for One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc.

cc: Randy Clarke
Marcus Maher
Tim Stelzig
Don Stockdale
Julie Veach

[18] The fact that Section 10(c) provides that a petitioner may "request[] that the Commission exercise the authority granted under this section" does not change the analysis. *Id.* It only means that a petitioner may request that the FCC exercise its authority to consider a forbearance petition, including the FCC's authority to define the relevant geographic market.

[19] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-46 (1984).